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Supreme Court, U.S.
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No. 93-1341

In the

Supreme Court of the United States

OCTOBER TERM, 1993

WEST PENN POWER COMPANY, ET AL.,
Petitioners,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF IN OPPOSITION OF RESPONDENT, MILESBURG ENERGY, INC.

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April 27, 1994

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RULE 29.1 LIST

Respondent Milesburg Energy, Inc. is a wholly owned subsidiary of Environmental Power Corporation. It has no subsidiaries that are not wholly owned.

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STATEMENT OF THE CASE

This short statement is intended to supplement and correct the statement of the case contained in the Petition for Certiorari.

1. Respondent Milesburg Energy, Inc. ("Milesburg") began negotiating on November 20, 1985 with petitioner West Penn Power Company ("West Penn") concerning Milesburg's proposal to establish a small electrical power production facility. (23a).[1] On February 25, 1987, West Penn and Milesburg formally entered into an Electric Energy Purchase Agreement ("EEPA" or "contract") containing rates based on the estimated avoided costs prepared by West Penn. (23a-24a). The EEPA imposed on Milesburg various milestone dates or deadlines for the project, including a Financing Closing Date of September 1, 1988. (25a). West Penn filed a petition with the Pennsylvania Public Utility Commission ("PUC") on April 2, 1987, requesting an order approving the contract terms under both PURPA and the state Public Utility Code and authorizing West Penn to pass its costs under the contract through to its ratepayers. (24a). The PUC entered an order on September 22, 1987, approving the EEPA and authorizing West Penn to recover its costs. (24a).

2. Petitioners Armco Advanced Materials Company ("Armco") and Allegheny Ludlum Corporation ("Allegheny") appealed, seeking an opportunity as ratepayers to participate in the PUC's review and adjudication of the terms of the EEPA between West Penn and Milesburg. On August 22, 1988 — just one week before the financing deadline for the Milesburg project — the Commonwealth Court, Pennsylvania's intermediate appellate tribunal, held in *Milesburg I*[2] that Armco and Allegheny were entitled to full participation in the PUC's hearings on West Penn's petition for approval of the Milesburg EEPA before the PUC could issue any order approving that contract. (25a). The ratepayers were found to have substantial property interests at stake (76a), because the

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[1] References to the Appendix to the Petition for Writ of Certiorari, which contains all of the various judicial and administrative opinions below, will be styled "__a." References to the Petition itself will be styled "Pet. at __."

[2] This decision, formally captioned *Barasch v. Pennsylvania PUC*, 119 Pa.Commonw.Ct. 81, 546 A.2d 1296 (1988), is reprinted as Appendix E to the Petition.

regulatory process initiated by West Penn was a formal adjudication of the proposed EEPA binding on third parties as well as on West Penn and Milesburg. (77a). The ratepayers were therefore entitled to individual notice and a full opportunity to participate in the PUC's consideration of the terms of the Milesburg EEPA. (10a, 25a, 83a). A remand to the PUC was accordingly ordered (90a), which led to eight days of hearings (26a), a 1,475-page transcript (10a), and an order that it took the PUC's administrative law judge two-and-a-half months to produce. (27a).

3. The PUC finally entered its order granting West Penn's petition for approval of the EEPA on September 29, 1989, by which time the EEPA had expired of its own terms. The PUC dealt with this event by exercising its power to order West Penn to enter into a new contract with Milesburg on the same terms as the original lapsed EEPA. (11a). As explained in the motion of PUC Chairman Bill Shane (Appendix M, 231a), the PUC issued this order in the course of the pending proceedings on West Penn's petition for approval of the now-lapsed contract, rather than requiring Milesburg first to institute new proceedings seeking such an order, because in the pending proceeding West Penn's own avoided cost formula (to which Milesburg had already agreed) would apply (to the benefit of ratepayers), whereas in any new proceedings Milesburg would be entitled to invoke the ordinary cost-determining methodology contained in the PUC's regulations (which would generate higher costs):

> The fact that Milesburg has not attempted to invoke the capacity credit methodology in the Commission's regulations means that ratepayers will pay *less* for Milesburg power than would otherwise be required. Rather than require Milesburg to initiate a separate proceeding to seek *higher* rates, as the ALJ recommended, the Commission should require West Penn to execute a new contract with Milesburg, identical in most respects to the lapsed 1987 contract . . . . It simply does not make sense to hold that Milesburg must initiate a new proceeding to seek rates higher than the rates it has requested.

(236a-237a) (original emphasis).[3]

4. The Milesburg project was held to be "beneficial to ratepayers and to Pennsylvania" and the "equities" were held to be on Milesburg's side. (239a). Chairman Shane noted that, in any event, the rates "in real terms" would not increase under the PUC's order when the time value of the money and the delayed in-service dates of the Milesburg project were taken into account. (239a). Even with the delay in the project, the price at which the electrical generation baseload capacity was obtained was "a bargain compared to rates that would be paid for utility-built capacity." (239a).

5. The PUC Chairman also stressed, as an additional reason to act within the pending proceeding, that "Milesburg already has been before the Commission and Commonwealth Court for 2-1/2 years." (237a). The full PUC echoed this concern after noting that the primary cause of the torturous delays in this case was the application of third-party ratepayers Armco and Allegheny to participate fully in the PUC's hearings:

> In our view it is essential that regulatory delay in the proceeding be recognized and reflected in our Order. To do otherwise would merely extend an open invitation to interventions in opposition to future QF [Qualifying Facility] proceedings since intervenors would realize that they could win by default, through the passage of time alone, results that could not be won on the merits.

(280a). As noted by the PUC Chairman, "In essence, intervenors w[ould] be able to kill future QF projects simply by filing answers in opposition to rate recovery petitions and taking the projects into a lengthy hearing and appellate process." (238a).

6. The Pennsylvania courts held that the PUC, when exercising its powers to promote development of cogeneration and small power

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[3] Furthermore, West Penn had "fine-tuned" its methodology between the execution of the Milesburg contract and the PUC's order, and incorporation of this refinement to calculate avoided costs under the PUC's order would have the effect of further lowering the rates paid to Milesburg, to the benefit of ratepayers. (237a).

production, has "full discretion" to "ensure that litigation delays do not become the factor that determines whether a project proceeds or fails." (39a-40a). As the foregoing discussion shows, the threat of such dilatory litigation was perceived by the courts and PUC below to be quite real in this case. In particular, the petitioners kept the proceedings going by continuously shifting their arguments about the proper date for determining full avoided costs under the Milesburg EEPA. Armco and Allegheny originally argued that the date was February 25, 1987, the date the original EEPA was executed. (13a). The Commonwealth Court adopted that position. (12a). Armco and Allegheny then argued to the Pennsylvania Supreme Court that the date should either be September 29, 1989, the date the PUC ordered West Penn to enter into a new EEPA with Milesburg, or January 28, 1988, the date Milesburg became certified as a qualifying facility. (13a). This "self-serving shifting of dates" was condemned by the court below. (13a).

7. Contrary to the impression one might derive from the Petition, the Pennsylvania Supreme Court was not "equally divided" on any issue relevant to this appeal. Pet. at 1, 15. The six sitting members of that tribunal affirmed the judgment of the Commonwealth Court *per curiam*. (2a-3a). A reading of the opinion of Justice Papadakos, concurring in part and dissenting in part, reveals that the Pennsylvania Supreme Court was unanimous in its conclusion that the PUC had power to order West Penn and Milesburg to enter into a power purchase agreement on terms prescribed by the PUC. (16a-17a). The only disagreement — and petitioners concede this point in a footnote, Pet. at 15 n.5 — was over the date for fixing avoided costs for that contract. Three of the Justices were content to affirm the Commonwealth Court, which settled on the date the original EEPA was formally executed, while Justice Papadakos and two others would have preferred the date traditionally employed by the PUC, the time of serious negotiations between the parties (13a) — that is, a date even *more* favorable to Milesburg. There were no votes on Pennsylvania's highest court to determine avoided costs on the date now preferred by petitioners: September 29, 1989, the date of the PUC's order some 2-1/2 years after Milesburg first committed itself to provide power. Three Justices below accepted the PUC's determination that under petitioners' logic, "avoided costs would become a constantly moving target, a phenomenon that would

undermine contract negotiations [and] chill the continued development of [the] cogeneration and small power production" promoted by PURPA. (13a).

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS NOT FINAL UNDER 28 U.S.C. § 1257.

Petitioners have "the burden of affirmatively establishing this Court's jurisdiction" under 28 U.S.C. § 1257, and that requires a showing that the judgment below is sufficiently final to warrant review at this time. *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 70-71 (1948). No such showing has been made — or could be made — in this ongoing utility regulation proceeding in which the precise terms of the EEPA at issue have not yet been determined.

The Supreme Court of Pennsylvania affirmed *per curiam* the orders of the Commonwealth Court. (2a). Those orders in turn remanded the case to the PUC with instructions to make new calculations of capacity cost credit with new input figures reflecting (1) a different date (February 25, 1987) for the determination of full avoided costs, (2) a different in-service date to be set at 30 months from the time the PUC's order becomes final and nonappealable, and (3) a financing closing date to be set at 6 months from when the PUC's order becomes final. (43a-46a). If the as-yet-undetermined capacity rate proves to be less than that to which West Penn and Milesburg initially agreed, Milesburg will have the option of declining to proceed with the project. (44a, 46a).

The calculations to be performed by the PUC on remand therefore control the outcome of this regulatory proceeding: depending on the new capacity rate, Milesburg could terminate the project and moot this entire dispute. Furthermore, Petitioners' second Question Presented is expressly premised on the ultimate approval by the PUC of rates "that are not 'just and reasonable,'" even though said rates cannot be calculated, let alone evaluated,

until the underlying capacity rate has been set. The outcome of these utility regulation proceedings is in no sense preordained. Further discretionary action by the PUC is required upon remand.

The finality requirement of § 1257 generally precludes Supreme Court review where the state court below has remanded to an administrative body for further proceedings. *See, e.g., Laclede Gas Light Co. v. Public Service Comm'n*, 304 U.S. 398, 400 (1938); *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores*, 414 U.S. 156, 159-60 (1973). This Court's dismissal of the appeal in *Republic Natural Gas* is instructive. A gas pipeline company had been ordered to purchase gas from another producer by a state regulatory commission, but the order left the precise terms of the purchase and the rates of payment open for later determination and was further qualified by the possibility that no such order would even be issued. 334 U.S. at 69. Justice Frankfurter wrote for the Court: "Certainly what remains to be done cannot be characterized as merely 'ministerial.' Whether or not the amount of gas to be taken by Republic from [the other producer] can be ascertained through application of a formula, the determination of the price . . . or the fees to be paid . . . clearly requires the exercise of judgment." *Id.* at 69-70.

Parallel circumstances are presented here. West Penn is subject to an order to enter into an agreement to purchase electricity from Milesburg, but the final terms of that agreement have not yet been determined. The PUC upon remand must apply its formula to new input data and Milesburg is free to terminate the project if the resulting capacity rate does not satisfy certain criteria. Were the Court to assume jurisdiction now, any opinion it issued might be rendered purely advisory. Since the judgment below lacks the necessary finality, the writ of certiorari should be denied.

II. PETITIONERS' GENERALIZED PLEA FOR GUIDANCE ON APPLYING PURPA DOES NOT JUSTIFY REVIEW OF THE DECISION BELOW.

The Petition presents a broad and generalized complaint about the state of the law under PURPA. Petitioners complain that, for over a decade, state PUCs and courts

> have been left without guidance from this Court, or from FERC, with respect to how PURPA's requirements are to be met in specific concrete circumstances. As a result, conflicts abound, even on such basic questions as whether PURPA preempts the field, and precludes states from enacting legislation that offers greater financial incentives to the developers of qualifying facilities by setting purchase rates at levels higher than a utility's avoided costs.

Pet. at 17.

Petitioners espouse a remarkable theory of certiorari jurisdiction: issuance of a writ is justified here, we are told, because of supposed conflicts or lack of guidance relating *to other questions that are not presented by this case*. Indeed, petitioners cast their net so widely that they sweep in questions that appear to have been decided long ago. For example, petitioners ask "whether PURPA preempts the field," Pet. at 17, a question that seems to have been answered in *FERC v. Mississippi*, 456 U.S. 742, 765 n.29 (1982), where this Court found it "evident that Congress intended to defer to state prerogatives — and expertise — in declining to pre-empt the utilities field entirely."

The more specific supposed conflict that petitioners identify concerns whether a state may promote cogeneration by requiring a utility to pay a qualifying facility more than the full avoided costs. Pet. at 17. Yet, as revealed by the very decisions that petitioners cite, the supposed conflict on this issue was raised in *Consolidated Edison Co. v. Public Service Comm'n*, 63 N.Y.2d 424, 483 N.Y.S.2d 153, 472 N.E.2d 981 (1984), in which this Court

dismissed the appeal for want of a substantial federal question, 470 U.S. 1075 (1985). Petitioners do not attempt to explain how or why this insubstantial question has become any more significant in the last nine years. If the conflict that petitioners allege did not constitute a federal question sufficiently substantial to warrant review under this Court's mandatory appellate jurisdiction in 1985, *a fortiori* it does not present a question worthy of discretionary review by writ of certiorari. Most important, that question could not in any event justify a writ in *this* case, since petitioners do not even contend that the question is presented here.

III. PETITIONERS' PLEA FOR "POLICY" GUIDANCE SHOULD BE DIRECTED TO FERC RATHER THAN TO THIS COURT.

Petitioners also base their call for Supreme Court intervention here on the supposed difficulties of applying PURPA "as economic conditions have changed." Pet. at 17. They contend that "PURPA policies" worked "so long as avoided costs of electricity were rising," but that vexing problems have now arisen in "a falling avoided-cost market." Pet. at 29. It seems that what petitioners are really asking for is not "guidance," but a new law. This complaint about the fit between the regulatory apparatus and changing times is unsuited for judicial resolution by this Court. Petitioners should take their ideas to FERC or to Congress.

Petitioners apparently concede that the guidance they seek about PURPA can be obtained either "from this Court, or from FERC." Pet. at 17. At least with respect to FERC, they are certainly correct. As FERC has itself explained, Congress has "provided that the Commission may serve as a forum for review and enforcement of the implementation of this program." 45 Fed.Reg. 12,214, at 12,231 (1980). Such FERC oversight may include review not just of state utility regulations, but also of the implementation of state rules on "a case-by-case basis." *Id.* at 12,231. This is particularly true with respect to the very FERC regulation that the petitioners have placed in issue: 18 C.F.R. § 292.301(b)(1). Pet. at 19. FERC has determined that it is neither "possible [n]or advisable to attempt to establish more precise guidelines" pertaining to this rule, and has therefore declared that the way to resolve questions about a state's

authority to review contracts for electricity purchases as part of its regulation of utilities is to "seek an interpretive ruling from the Commission's General Counsel." 45 Fed.Reg. 12,214, at 12,233.[4]

Petitioners instead ask this Court for certiorari on the ground that "this Court's guidance is required to resolve these important and recurring *policy questions*." Pet. at 29 (emphasis added). With all due respect to the value of the Court's guidance in solving difficult problems, such "policy questions" about utilities regulation are the proper province of the legislative and executive branches, which stand ready to hear petitioners' pleas and to answer their questions.

IV. THE SUPPOSED CONFLICT OF WHICH PETITIONERS COMPLAIN, IF IT EXISTED, WOULD REFLECT NOTHING MORE THAN THE VARIATION AND EXPERIMENTATION AMONG THE STATES THAT PURPA ENVISIONS.

Petitioners contend that the Court must take jurisdiction of this case in order "to achieve some semblance of consistency among the fifty separate state regulatory and judicial systems that have been charged by Congress with implementing the federal mandates of PURPA." Pet. at 18. What petitioners fail to understand is that PURPA's unique brand of cooperative federalism anticipates and virtually guarantees variation among the states on implementation of PURPA. This variety, which petitioners misapprehend as "conflict" or disorder, is PURPA's signature characteristic.

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[4] Petitioners' suggestion, Pet. at 17 n.7, that the Court seek the views of FERC through the Solicitor General is untimely and inappropriate. If petitioners want guidance on their questions from FERC, they should have asked FERC directly long ago in accord with standard procedure, rather than asking this Court to serve as an intermediary at this late stage of the litigation. Given the availability of this means of resolving petitioners' questions about FERC regulations, their decision instead to seek review here on these broad inquiries suggests that what petitioners, particularly Armco and Allegheny, really want is simply an opportunity to drag out this power purchase litigation for as long as possible — a regrettable course previously noted by the PUC and the Pennsylvania courts below. (13a, 39a-40a, 237a-238a).

As this Court noted in *FERC v. Mississippi*, PURPA embodies a congressional decision "to defer to state prerogatives — and expertise" — in utility regulation. 456 U.S. at 765 n.29. The states are "'to enact and administer their own regulatory programs, structured to meet their own particular needs.'" *Id.* at 767 (citation omitted). PURPA "gives full force to the States' ultimate policy choices." *Id.* at 765 n.29.

Much of the procedure of PURPA, like its substance, has been left in the states' hands, due to what this Court has deemed "the congressional determination that the federal rights granted by PURPA can appropriately be enforced through state adjudicatory machinery." *Id.* at 761. Furthermore, all regulatory findings and determinations relating to PURPA's implementation are reviewable in those state courts under the substantive standards of review as established under State law, without restriction of the discretion exercised by the states under their own law. H.R. Conf. Rep. No. 1750, 95th Cong., 2d Sess. 83-84 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7797, 7817-18 ("Conf.Rep."). As petitioners themselves point out, PURPA denies the lower federal courts jurisdiction to review state utility regulatory proceedings. Pet. at 16 & n.6. There is no hint in any of these aspects of PURPA that Congress perceived any need or desire for state uniformity. Indeed, if a lack of variety or "conflict" in state implementation of PURPA were the goal, it is hard to imagine a *less* effective way for Congress to achieve it than to have assigned implementation, as petitioners put it, to "fifty separate state regulatory and judicial systems." Pet. at 18.

Petitioners seem to think that what they characterize as "the peculiar jurisdictional provisions of PURPA," Pet. at 29, are a serious flaw in the statute that requires intervention by this Court to bring uniformity to state utility regulation. On the contrary, as FERC has recognized, PURPA and its implementing regulations afford the states "great latitude in determining the manner of implementation of the Commission's rules" because "economic and regulatory circumstances vary from State to State." 45 Fed.Reg. 12,214, at 12,230-12,231 (1980). Indeed, when it undertook the formulation of rules to implement PURPA, FERC expressly rejected calls to impose more restrictive, uniform rules on the states, in

favor of "providing an *opportunity for experimentation by the States*." *Id.* (emphasis added). FERC thus recognized the wisdom of Justice Brandeis's oft-quoted words: "To stay experimentation in things social and economic is a grave responsibility. . . . It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments . . . ." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Of course, FERC's own interpretation and application of PURPA are entitled to great deference. *American Paper Inst. v. American Electric Power Service Corp.*, 461 U.S. 402, 422-23 (1983). *See also Chevron v. NRDC*, 467 U.S. 837, 842-44 (1984).

This Court's previous encounters with PURPA track FERC's aversion to arguments calling for uniformity in state utility regulation. In *FERC v. Mississippi*, the Court confirmed that "local experimentation and self-determination are essential aspects of the federal system." 456 U.S. at 765 n.29. *See also id.* at 788-89 (O'Connor, J., joined by Burger, C.J., and Rehnquist, J., concurring in the judgment in part and dissenting in part). In *Consolidated Edison Co. v. Public Service Comm'n*, the Court concluded that a lack of uniformity among the states on the issue of requiring utilities to pay more than full avoided costs for electrical purchases did not raise a substantial federal question. *See* 470 U.S. at 1076-78 (White, J., dissenting from the dismissal). The state court conflict presented in that case was far more stark than the one alleged here; it follows that this case is unworthy of review.

V. THE FIRST QUESTION POSED BY THE PETITION IS NOT PRESENTED BY THE DECISION BELOW, AND EVEN IF IT WERE, THAT QUESTION INVOLVES NO IMPORTANT ISSUES OF FEDERAL LAW WARRANTING REVIEW.

Petitioners' first Question Presented asks whether state PUCs "have been granted broad powers under PURPA to modify the terms of privately-negotiated [*sic*] purchase agreements." Pet. at i.

That question is not presented by this case. The factual premise of the question is missing in two respects: the Pennsylvania PUC did not "modify" the terms of a "privately negotiated" contract. Such an event simply did not occur. No privately negotiated agreement existed when the PUC acted. The power purchase agreement previously worked out between West Penn and Milesburg had lapsed of its own terms because certain conditions were not met and time ran out. Hence, there was nothing for the PUC to "modify." Instead, as petitioners themselves concede, "the PUC entered a formal *Order* directing West Penn to enter into a *new* agreement with Milesburg." Pet. at 3 (emphasis added). *See also id.* at 26. Petitioners further "concede[] that the PUC has the authority to order [a utility] to enter into a power purchase agreement with a qualifying facility." Pet. at 4.

No "privately negotiated" or "freely negotiated" agreement is at issue here. Although petitioners chant that phrase like some sort of mantra, Pet. at i, 18, 19, 20, 23, repeating it does not make it so. As several Justices of the Pennsylvania Supreme Court noted below, in this case "[w]e are not, after all, dealing with completely free enterprise. We are, rather, dealing with the twilight world of regulated monopolies," where a utility's "'obligation is not governed by common law concepts of contract law; it is created by statutes, regulations and administrative rules. . . .'" (15a) (Papadakos, J., joined by Flaherty and Zappala, JJ.). Whatever the differing procedures in other states to which petitioners refer, under *Pennsylvania law* West Penn subjected its entire contract to PUC scrutiny when it sought formal, dispositive adjudication of the legality of the rates that it would ultimately charge for that electricity. (38a). That submission for pre-approval "necessarily invokes the full power and duty of the PUC to examine all of the contract's terms and conditions to ensure that they are in compliance with" the law. (37a-38a).

Under the Pennsylvania regulatory regime set forth in *Milesburg I*, third parties, including utility ratepayers, have substantial rights in such regulatory proceedings and are entitled to be heard and to participate in the adjudication of the terms of the proposed power purchase agreement. The nearly two weeks of administrative hearings held by the PUC in this case, which produced 1,475 transcript pages of adversarial interventions by third parties, cannot,

contrary to petitioners' insistence, be considered "free negotiations." Nor can the purchase agreement that ultimately resulted from this multiparty adjudicatory process, in the form of an order by the PUC directing West Penn to purchase power from Milesburg, fairly be characterized as a bilateral "privately negotiated contract."

It is petitioners, rather than the Pennsylvania courts, who have confused "negotiated contracts" with "commission orders to purchase power." Pet. at 20. Nothing in the judgment below impairs the ability of utilities to negotiate with qualifying facilities for the purchase of electricity. All that has been confirmed here is the unremarkable proposition that if a utility company fails to reach agreement with a cogeneration facility that proposes to sell power to it, or if the contract between the two falls apart, then the PUC retains its authority to order the utility to buy power from the qualifying facility in order to further PURPA's cogeneration goals.

Petitioners' supposedly contrary authorities cast no doubt on the judgment below nor do they create any conflict or controversy worthy of the attention of this Court. For example, *In re Vicon Recovery Systems*, 153 Vt. 539, 572 A.2d 1355 (1990), offers no support for petitioners' attempt to impose an administrative straitjacket of their own fabrication on utility regulation in Pennsylvania. Even if a private, bilateral contract were at issue here — which is not the case — *Vicon* held that PURPA does *not* preclude state PUCs from regulating voluntary power purchase agreements: "Congress did not mandate the creation of a zone in which utility activities would be completely unfettered by regulatory oversight." 572 A.2d at 1358. Indeed, the Vermont Supreme Court made a point of deferring to the PUC's discretion in setting avoided costs for a purchase agreement. *Id.* at 1361. This decision thus recognizes that a PUC's exercise of its discretionary power is entitled to deference from the state courts that are charged with responsibility for policing state implementation of PURPA. The Pennsylvania courts have performed that role here and there is no reason for this Court to disturb their judgment.[5]

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[5] Petitioners' remaining cases avail them little. With respect to *Water Power Co. v. PacifiCorp*, 99 Or.App. 125, 781 P.2d 860 (Or.Ct.App. 1989), *review denied*, 309 Or. 291, 787 P.2d 887, *cert. denied*, 498 U.S. 811 (1990), the petitioners

No federal question of any consequence is presented here. PURPA anticipates and embraces variation among state regulatory schemes and it was entirely reasonable for Pennsylvania's PUC to exercise its undenied authority to order West Penn to purchase power from Milesburg. It is vital to keep in mind what the Petition conspicuously fails to mention: the PUC issued its order in the already pending proceedings initiated by West Penn's application for approval of its since-lapsed contract, rather than first requiring Milesburg to institute a new proceeding seeking such an order, for the simple reason that acting within West Penn's proceeding allowed the PUC to bind Milesburg to West Penn's formula for calculating avoided costs, whereas in a new proceeding Milesburg would have been entitled to invoke the PUC's different formula, which would have generated higher costs for West Penn and higher electrical rates for West Penn's customers. Pennsylvania's flexible approach to such proceedings — which made a point of affording full due

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themselves note the obvious and dispositive distinction: it was a civil breach of contract case involving only the post hoc remedy of damages, 781 P.2d at 861 & n.1, rather than the question, presented here, of the PUC's affirmative, prescriptive authority to order a utility to purchase power from a qualifying facility. The case is therefore irrelevant.

Petitioners assert that *Bates Fabrics Inc. v. Public Utilities Comm'n*, 447 A.2d 1211 (Me. 1982), involved "similar circumstances" to the present case, but this is not so, because the contract at issue there had been executed *before PURPA was even enacted*. Petitioners quote dicta from the opinion, Pet. at 23, but omit from their quotation the sentence setting forth the Maine Supreme Court's holding: "[FERC] has indicated that contracts executed prior to the enactment of the PURPA are not affected by the Act." 447 A.2d at 1214.

Assuming *arguendo* that Texas regulatory practice is pertinent to any review of Pennsylvania's utility regime, the very different circumstances that obtained in *Public Utility Comm'n v. Gulf States Utilities Co.*, 809 S.W.2d 201 (Tex. 1991), render that case inapposite. The Texas court held only that the Texas PUC could not impose extra conditions on a privately negotiated bilateral contract that had not lapsed. *Id.* at 209. As explained above, no such contract existed here. Moreover, the Texas court reminded the parties that although Gulf States could contract as it wished without PUC interference, whether the costs of that contract could ultimately be passed on to ratepayers was a separate question that would eventually be subject to the Texas PUC's ordinary plenary ratemaking authority. *Id.* Under Pennsylvania law, West Penn's proposed contract was subject to plenary review involving non-parties before the ratemaking process began, and the PUC exercised its discretion in this regard by ordering West Penn to enter into a purchase agreement with Milesburg.

process rights to the petitioners — thus advanced PURPA's goals by promoting electrical generation by qualifying facilities while safeguarding ratepayers from unnecessarily high rates.[6]

VI. THE SECOND QUESTION POSED BY THE PETITION IS NOT RIPE, AND EVEN IF IT WERE, IT WOULD REQUIRE THIS COURT TO REVIEW A DISCRETIONARY, FACT-INTENSIVE JUDGMENT OF THE PENNSYLVANIA PUC.

Petitioners' second Question Presented asks whether a state PUC may decide that a "legally enforceable obligation" to deliver electricity existed on a particular date "*when the use of that date results in rates that . . . are not 'just and reasonable' to the utility's customers.*" Pet. at i (emphasis added). The final condition in the question is crucial: it does not question whether a PUC may use that particular date to determine full avoided costs, but *only* whether the PUC may use that date *if* the calculation then leads to unjust and unreasonable rates.

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[6] Finally, even if this case actually involved a privately negotiated contract that the PUC purported to modify, the question presented would *not* be whether PURPA *grants* PUCs broad power to so modify, but, instead, whether PURPA affirmatively *denies* such power to state PUCs and preempts state legislation or judicial doctrines conferring such power under state law. FERC itself has declared that the regulation at issue here does not divest states of their authority over private power purchase contracts. 45 Fed.Reg. 12,214, at 12,233 (1980). *See also Vicon*, 572 A.2d at 1358-59. Moreover, petitioners have raised no preemption argument or constitutional challenge to state exercises of such regulatory power. So long as PURPA does not forbid what the PUC did below, no *federal* question is presented. The question whether the PUC's action, even if not authorized by a federal grant under PURPA, was nevertheless authorized by state law is an issue of absolutely no consequence to the federal regime supervised by FERC and of absolutely no interest to this Court. To be sure, the PUC and the courts below seem to have assumed that the PUC was acting under federal law (39a, 287a), but that question was not presented to the Pennsylvania courts in those terms. The questions petitioners presented to the Commonwealth Court asked only whether the PUC had power to issue its order, *not* whether that power was derived from PURPA or state law, Pet. at 12, (20a), and there is no definitive ruling of the Pennsylvania Supreme Court on this state law issue. There is no point in this Court deciding whether PURPA grants power to modify private contracts if the states themselves may confer such power on their PUCs.

By its own terms, the second Question Presented therefore requires the petitioners to prove that the electrical rates the Pennsylvania PUC will ultimately approve for the West Penn-Milesburg power purchase are unjust and unreasonable under the law. The question is therefore wholly premature, because, as explained above, pages 5-6, those rates have not yet been determined and will not be set until the regulatory process is completed following the remand to the PUC. (20a, 43a-46a, 288a). If the rates the PUC eventually sets are ultimately held by the Pennsylvania courts to be just and reasonable, petitioners' second Question will not be presented and any grant of certiorari in this case would only generate an advisory opinion.

In the alternative, assuming *arguendo* that the pertinent electrical rate has already effectively been determined, at least to the extent that the *formula* for determining full avoided costs has already been approved by the PUC and the courts below (35a, 40a, 43a, 45a), then this Court could reach the second Question Presented *only* if it first overturned the fact-intensive judgment of the PUC and the Pennsylvania courts that the formula is fair and reasonable. The PUC has in fact held that the formula and the contract orders incorporating it are reasonable and in the ratepayers' best interests. (232a, 236a-237a, 256a-270a, 295a).

Substantial deference is due the state regulatory machinery on this complex administrative judgment. Perhaps more important, *none* of the petitioners is in a position to attack the use of the formula chosen by the PUC and the Pennsylvania courts, because (1) the formula was designed and proposed by West Penn itself (35a), and (2) petitioners Armco and Allegheny were conclusively held below to have waived any challenge to the formula. (35a).

VII. PETITIONERS' SECOND QUESTION IS CURIOUS GIVEN THEIR CONTRARY ARGUMENTS BELOW, AND IT IS IN ANY EVENT PREDICATED ON A FUNDAMENTAL MISUNDERSTANDING OF PURPA.

Petitioners eventually make clear that their complaint is not really about the way Pennsylvania has implemented FERC regulations, but about the regulatory scheme itself: in particular, the supposed unsuitability of FERC's "legally enforceable obligation" rule as a basis for determining full avoided costs now that economic conditions have changed and utilities operate within "a falling avoided-cost market." Pet. at 29. As previously explained, page 8-9, *supra*, these concerns — which petitioners candidly characterize as "recurring *policy* questions," Pet. at 29 (emphasis added) — should be directed to the legislators across the street or to the regulators at FERC.[7]

If this Court were nevertheless to reach petitioners' argument for mandating that all of the states always determine avoided costs on

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[7] Even on the merits, petitioners' argument about state regulatory responses to changing market conditions is unconvincing. Even if they could show that the states have taken differing approaches in responding to falling avoided-cost markets, it would be of no consequence. PURPA envisions and promotes such variation and experimentation by the states. And in any event, petitioners' "falling market" cases in fact reveal no significant conflict on the issue. Pet. at 29 n.12. *Long Island Lighting Co. v. Public Service Comm'n*, 606 N.Y.S.2d 406 (App.Div. 3d Dep't 1993), and *Xiox Corp. v. Public Service Comm'n*, 190 A.D.2d 350, 598 N.Y.S.2d 821 (App.Div. 3d Dep't), *appeal dismissed*, 82 N.Y.2d 790, 604 N.Y.S.2d 551, 624 N.E.2d 688 (1993), did not involve avoided cost schedules that were valid at the time of negotiations but subsequently invalidated by changing markets. The long run avoided cost schedules in those cases were abandoned by the New York PUC because they were inflated and "glaringly incorrect" even on the date they were originally determined. *Xiox*, 598 N.Y.S.2d at 823; *Long Island*, 606 N.Y.S.2d at 407-08. Indeed, *Xiox* confirms that a qualifying facility such as Milesburg enjoys under federal law "the prerogative of opting for a contract price based on a reasonable approximation" of long-run avoided costs at the time it incurs a legally enforceable obligation to deliver power. 598 N.Y.S.2d at 823. The regulatory approach applied in these lower state court decisions is therefore not in conflict with the state supreme court decisions cited by petitioners, Pet. at 29 n.12, which, as petitioners point out, support the Pennsylvania judgment below.

a date different from the date of contract execution chosen by the Pennsylvania courts, the Court would find it very difficult to take that argument seriously. The sad fact is that petitioners' choice of the appropriate date changes almost every time they file a new brief. West Penn cannot credibly complain of setting costs at the date of contract execution, because West Penn argued vigorously to the PUC that "calculation of avoided costs at the time of agreement in principle on rates [an earlier date and more favorable to Milesburg even than the date adopted by the courts below] is critical to encourage and stabilize the process of voluntary negotiation of contracts under PURPA." (252a).

Petitioners Armco and Allegheny likewise argued below for determining costs on the date of contract execution, the date chosen by the Pennsylvania courts. (13a). As the Justices of the Pennsylvania Supreme Court observed, Armco and Allegheny change their argument whenever some new event, however extraneous — such as an amendment to the tax laws — makes a different date for fixing costs more agreeable to their pocketbooks. (13a). Their position is born not of logic and principle but of opportunism. Such "self-serving shifting of dates by Armco/[Allegheny]" (13a) drains their arguments of any credibility or persuasive force.[8]

On the merits, petitioners' argument for determining avoided costs as of the date of the PUC's order to West Penn, rather than the date West Penn and Milesburg first reached an agreement, is fatally flawed by their assumption that the setting of "just and reasonable" rates looks solely to the immediate interest of a utility's customers in the lowest possible rate. This is incorrect. Section 101 of PURPA lists the statute's goals as including not only "equitable rates to consumers," but also energy conservation and "optimization of the efficiency of use of facilities and resources by

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[8] Any concern that state courts and PUCs are unable to determine when qualifying facilities have legally obligated themselves to provide power is as unfounded (and as condescending) as fears that state courts and PUCs are unable to determine whether electric cogeneration companies and other small producers are in the first place qualified under the law to provide electricity to utilities pursuant to PUC orders. *Cf. Empire Lumber Co. v. Washington Water Power Co.*, 114 Idaho 191, 755 P.2d 1229, 1232 (1987), *cert. denied*, 488 U.S. 892 (1988).

electric utilities." *See* Conf.Rep. at 69, 1978 U.S.C.C.A.N. at 7803. The Conference Report on PURPA makes it clear that these goals are independent and that all three goals need not be maximized in any particular case for PURPA's ends to be served. *Id.* Optimal use of the resources offered by qualifying facilities requires that those electrical producers be allowed to lock in costs based on estimates of future costs. Thus, FERC has "recognized a need for certainty with regard to return on investment in the fledgling technologies, stating that the import of [its power purchase rules] is to promote that certainty by assuring a qualifying facility the benefit of its commitment." *Appeal of Public Service Co. of N.H.*, 130 N.H. 285, 539 A.2d 275, 280 (1988).

All that petitioners have done is identify the obvious tension between the requirement that rates for purchases from qualifying facilities not exceed full avoided costs (for the ratepayers' sake) and the fact that contracts with such facilities must necessarily be based on estimates of future costs. It should come as no surprise that FERC anticipated this tension and has already addressed it. FERC's rules setting costs as of the date of the "legally enforceable obligation" to deliver power

> are intended to reconcile the requirement that the rates for purchases equal the utilities' avoided cost with the need for qualifying facilities to be able to enter into contractual commitments based, by necessity, on estimates of future avoided costs. Some of the comments received regarding this section stated that, if the avoided cost of energy at the time it is supplied is less than the price provided in the contract or obligation, the purchasing utility would be required to pay a rate for purchases that would subsidize the qualifying facility at the expense of the utility's other ratepayers. The Commission recognizes this possibility, but is cognizant that in other cases, the required rate will turn out to be lower than the avoided cost at the time of purchase. The Commission does not believe that the reference in the statute to the incremental cost of alternative energy was intended to require a minute-by-minute evaluation of costs which would be checked against rates established in long term contracts between qualifying facilities and electric utilities.

> . . . The import of this section is to ensure that a qualifying facility which has obtained the certainty of an arrangement is not deprived of the benefits of its commitment as a result of changed circumstances. This provision can also work to preserve the bargain entered into by the electric utility . . . .

45 Fed.Reg. 12,214, at 12,224 (1980). *Accord Afton Energy v. Idaho Power Co.*, 107 Idaho 781, 693 P.2d 427, 433 (1984).

In short, FERC analyzed the problem at length and concluded that it was imperative under PURPA to provide "certainty with regard to return on investment in new technologies," comforted always by its parallel conclusion that, "in the long run, 'overestimations' and 'underestimations' of avoided costs will balance out." 45 Fed.Reg. at 12,224. FERC's position, which is entitled to great deference, comports with this Court's own previous analysis of PURPA.[9] FERC's interpretation of PURPA has also been endorsed by many state supreme courts.[10] As both the PUC and the concurring Pennsylvania Supreme Court Justices concluded below, "no matter what point in time is used to fix rates, ratepayers will bear

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[9] With respect to the need to avoid subjecting qualifying facilities to the burdens of what FERC calls "minute-by-minute evaluation of costs," the Court confirmed in *American Paper* that "Congress did not intend to impose traditional ratemaking concepts on sales by qualifying facilities." 461 U.S. at 414. This Court also accepted FERC's recognition that although "the full-avoided-cost rule would not directly provide any rate savings to electric utility consumers," it was "more important that the rule could 'provide a significant incentive for a higher growth rate' of cogeneration and small power production, and that 'these ratepayers and the nation as a whole will benefit from the decreased reliance on scarce fossil fuels . . . .'" *Id.* at 415 (quoting 45 Fed.Reg. at 12,222).

[10] *See Afton Energy v. Idaho Power*, 693 P.2d at 432, 434 (qualifying facilities are not subjected under PURPA "to the pervasive utility-type regulation" that would be required for rates continuously to reflect current avoided costs); *Appeal of Public Service Co. of N.H.*, 539 A.2d at 280 (noting FERC's opinion that "overestimations and underestimations in avoided costs w[ill] balance out over the long run"); *Smith Cogeneration Mgmt., Inc. v. Corporation Comm'n*, 863 P.2d 1227, 1239 (Okla. 1993) (qualifying facility that uses estimates of future costs made at time legal obligation is incurred is entitled "to receive the benefits of the contract even if, due to changed circumstances, the contract price for the power at the time of delivery is unfavorable to the utility").

the risk that rates will go down and [qualifying facilities] will bear the risk that they will go up." (14a).

The cases cited by petitioners do not support the different legal rule that petitioners propose. Neither *Vicon, supra,* nor *Petition of East Georgia Cogeneration*, 158 Vt. 525, 614 A.2d 799 (1992), purported to set the time of issuance of a PUC order compelling a utility to purchase power from a qualifying facility as the rigid, legally mandated date for determining full avoided costs under PURPA. Instead, the Vermont Supreme Court in both of those cases simply *deferred* to the state PUC's *discretionary judgment* in calculating avoided costs as of the date the PUC deemed most appropriate under all the circumstances. *See Vicon*, 572 A.2d at 1361 ("We are not prepared to hold that, in striking the balance here, the Board abused its discretion by refusing to apply a general rule to an exceptional set of circumstances."); *East Georgia*, 614 A.2d at 803 ("[W]e give great deference to the particular expertise and informed judgment of the Board"; findings will be overturned only if "clearly erroneous" and an "abuse of discretion.").

Similar deference is to due the judgment of the Pennsylvania PUC, as affirmed by the state courts below, unless this Court wishes to assume the role of national public utility commission of last resort.

Petitioners' remaining case, *A.W. Brown Co. v. Idaho Power Co.*, 121 Idaho 812, 828 P.2d 841 (1992), actually undermines their argument by showing the degree to which they must distort a case to make it support their arguments. Petitioners misrepresent the decision in a number of respects. They assert — with italics, no less — that the Idaho Supreme Court "refused to countenance a situation in which ratepayers could be required to pay more than a utility's *current* avoided costs," in supposed violation of PURPA. Pet. at 28 (original emphasis). This is completely untrue. The entire scheme set up by the Idaho PUC and left undisturbed by the Idaho Supreme Court allowed small power producers meeting certain requirements to be "grandfathered" into a previous payment scheme utilizing higher rates reflecting *more* than "*current* avoided costs." *See* 828 P.2d at 843. But A.W. Brown Company did not qualify for this program because, contrary to petitioners' further

mischaracterizations: (1) A.W. Brown had not "attained qualifying status under PURPA," Pet. at 28, by the appropriate deadline (A.W. Brown did not even file the notice of status until after it filed its lawsuit), 828 P.2d at 846, and (2) A.W. Brown had not engaged in any "negotiations with the utility," Pet. at 28, before the cut-off date. All Brown had done was to ask the utility about rates, for which it received a form letter in reply that Brown tried to characterize as an unconditional offer to purchase electricity. 828 P.2d at 843, 847. Far from supporting petitioners' position, it appears that application of the Idaho regime in this case would entitle Milesburg to the avoided cost schedule approved by the Pennsylvania courts below, because Milesburg had already signed a contract with West Penn locking in that cost schedule. *Cf. A.W. Brown*, 828 P.2d at 846.

Reflecting misunderstanding not only of PURPA, but of the cases applying it, the petitioners' request for review should be denied.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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